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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,
Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

HISTORY OF SECTION 5330 OHIO GENERAL CODE

(1) Sec. 13 of Act of Feb. 17, 1809 (7 Ohio Laws 188) Establishing Miami University in Oxford, Butler County, Ohio, provided that the Federal Grant of College lands were to be held in trust and "shall be exempt from all state taxes."

(2) "AN ACT FOR LEVYING TAXES ON ALL PROPERTY IN THE STATE ACCORDING TO ITS TRUE VALUE." Passed March 2, 1846, (44 Ohio Laws 85)

Sec. 7 of said Act provides:

"Property held under a lease, and belonging to any religious, literary, scientific, or benevolent society or institution, whether incorporated or unincorporated, shall be considered, for all purposes of taxation, as the property of the person so holding the same, and shall be listed as such by such person or his agent, as in other cases; BUT NOTHING IN THIS ACT SHALL BE SO CONSTRUED AS TO SUBJECT ANY LAND HELD UNDER A LEASE FROM ANY UNIVERSITY, COLLEGE OR OTHER LITERARY INSTITUTION, OR ANY SCHOOL LAND OR LANDS GRANTED BY CONGRESS FOR RELIGIOUS PURPOSES, HELD UNDER A LEASE, DURING THE CONTINUANCE OF SUCH LEASE, TO THE PAYMENT OF ANY TAX FROM WHICH SUCH LEASEHOLD IS EXEMPT BY THE LAW AUTHORIZING THE LEASE.

(3) "AN ACT FOR THE ASSESSMENT AND TAXATION OF ALL PROPERTY IN THIS STATE, AND FOR LEVYING TAXES THEREON ACCORDING TO ITS TRUE VALUE IN MONEY." Passed April 13, 1852, (50 Ohio Laws 135)

Sec. 5. "Property held under a lease for a TERM EXCEEDING FOURTEEN YEARS, belonging to the state, or to any religious, scientific, or benevolent society, or institution, whether incorporated or unincorporated, and school and ministerial lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same, and shall be listed as such by such person or his agent, as in other cases." (Swan's Statutes 903)

And in the amendatory Act passed March 12, 1853 (Swan 924) which exempts from Taxation certain property of institutions of learning, provides that such exemption "shall not extend to leasehold estates

of real property held under the authority of any college or university of this state."

Said Section 5 of said Act of April 13, 1852 was construed by the Ohio Supreme Court in *December 1856* as being in contravention of Section 10 of Article 1 of the Constitution of the United States, in the companion cases of *Matheny* vs. *Golden*, (5 O. S. 361) Athens County, and *Kumler* vs. *Traber*, (5 O. S. 442) Butler County, Ohio. Said Supreme Court perpetually enjoined said Auditors and Treasurers of said two counties, *and their successors in office forever* "from ever assessing, levying and collecting any and all State Taxes upon said Ohio University and Miami University lands."

Said injunction of December 23, 1856 is still in full force and effect, for as recently as July 28, 1948, the Supreme Court of Ohio cited, approved and followed its decisions in *Matheny* vs. *Golden* and *Kumler* vs. *Traber*, in the recent case of *Orphans' Asylum* vs. *Board of Tax Appeals*, 150 Ohio State 219 (37 O. O. 470), using the following language:

> Page 225. "In the Case of Matheny vs. Golden, Treas., 5 Ohio State 361, involving the Act of the General Assembly incorporating Ohio University and providing that the University's lands should forever thereafter be exempt from all taxes, this court held that subsequent legislation levying taxes upon the lands of the University impaired the obligation of contract and was null and void."
>
> Syllabus No. 2. "A special act of the General Assembly, incorporating and chartering a home for poor children in 1845 and providing that all property of the home shall be exempt from taxation, *created a contract between the state and the Home*, not subject to impairment or modification by any subsequent constitutional

or statutory provisions authorizing or imposing a tax on such property."

After the Supreme Court injunction of 1856 there was enacted:

(4) "AN ACT FOR THE ASSESSMENT AND TAXATION OF ALL PROPERTY IN THIS STATE, AND FOR LEVYING TAXES THEREON ACCORDING TO ITS TRUE VALUE IN MONEY," Passed April 5, 1859 (56 Ohio Laws 175) Revised Statutes 2733.

Sec. 5. "Property held under a lease for a term exceeding 14 years, belonging to the State, or to any religious, scientific, or benevolent society, or institution, whether incorporated or unincorporated, and school and ministerial lands, shall be considered, for all purposes of taxation, as the property of the persons so holding the same, and shall be listed as such by such person or his agent, as in other cases."

(5) "AN ACT TO AMEND SEC. 2733 of the Revised Statutes of Ohio, Passed February 17, 1881, (78 Ohio Laws 32) Rev. St. 2733.

(Italicized following words show the changes made)

"All lands held under lease for any term exceeding fourteen years *and not subject to revaluation*, BELONGING TO THE STATE *or any municipal corporation*, or to any religious, scientific or benevolent society, or institution, whether incorporated or unincorporated, *or to trustees for free education only*, and school and ministerial lands, shall be considered for all purposes of taxation as the property of the person *or persons* holding the same, and shall be assessed in their name.

(6) "AN ACT TO AMEND SEC. 5330 *of the General Code* SO AS TO PROVIDE A DEFINITE RULE FOR VALUATION OF SCHOOL AND MINISTERIAL LANDS HELD UNDER PERPETUAL LEASE." On May 6, 1919, Ohio General Code Section 5330 (formerly

Revised Statutes 2733) was amended in its present form. (108 Ohio Laws, Part One, p. 612)

THE FIRST PARAGRAPH OF SEC. 5330 O. Gen. Code only is involved here:

Sec. 5330. "LANDS HELD UNDER LEASE BY RELIGIOUS SOCIETY, ETC. AND SCHOOL AND MINISTERIAL LANDS UNDER LEASE SHALL BE VALUED AND ASSESSED IN NAMES OF LESSEES."

"Whenever lands belonging to the State, a municipal corporation, religious, scientific or benevolent society or institution, whether incorporated or unincorporated, or to trustees for free education only, or held by the state in trust, are held under lease for a term of years renewable forever and not subject to revaluation, such lands shall be considered, for all purposes of taxation, as the property of the lessees and shall be assessed in their names. Whenever school and ministerial lands are held under perpetual lease subject to revaluation, the interest of such lessees in such lands shall be subject to taxation. In determining the value for purposes of taxation of such leasehold interest, the annual rent reserved in the lease shall be capitalized on a six per centum basis and that sum deducted from the true value of the land in money; the result so obtained plus the value of all the improvements upon such land shall be the appraised taxable value of such leasehold interest."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,
Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, JOHN W. WENDEL, AS TREASURER OF BUTLER COUNTY, OHIO, AND CHARLES B. WALKE, AS SHERIFF OF BUTLER COUNTY, OHIO,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT IN SUPPORT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The appellant James E. Hendricks, in support of the jurisdiction of the Supreme Court of the United States to

review the above entitled cause on appeal, respectfully represents:

A

The Basis upon Which It Is Contended That the Supreme Court Has Jurisdiction

Appellant's suit filed in the Butler County, Ohio, Common Pleas Court, to enjoin the assessing in appellant's name of state real estate taxes, levied by the defendants-appellees under the claimed power of Sec. 5330 Ohio General Code, upon lands leased to him by the Miami University in Oxford Township, Butler County, Ohio, when he is entitled to an "exemption from all state taxes" by Sec. 13 of the Act of February 17, 1809 (7 Ohio Laws 188) establishing the Miami University. Said Sec. 13 is set forth and pleaded in plaintiff's petition (Record p. 8) in the Common Pleas Court as follows:

> "Section 13. Be it further enacted, that the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors, and other officers, students, and servants of the university, and any buildings appertaining thereto; and also the dwelling-houses and other buildings which may be built and erected on the lands, shall be exempt from all state taxes."

Plaintiff-appellant claims that the levying, assessing and collecting of such taxes by the defendants impairs the obligation of Appellant's contract of lease for 99 years, renewable forever, executed by The President and Trustees of the Miami University as lessors. Said College Township was located in Oxford through an Act of the General Assembly of Ohio in April 1803 (1 Laws Ohio 66) "for the use and support of an academy, in lieu of the college township here-

tofore granted in trust to John C. Symmes and his associates, by the United States," etc.

Appellant-plaintiff has invoked in the Butler Common Pleas Court, Butler County Court of Appeals, and in the Ohio Supreme Court the protection of the contract clause of the U. S. Constitution, Art. 1, Sec. 10, which provides that "No State shall pass any . . . law impairing the obligation of contracts," and has in every way, claimed that Ohio Gen. Code Sec. 5330 is unconstitutional in that it is a law impairing the obligation of the contract of lease made by the lessors Trustees.

The obligation of the contract of lease consists in its binding force on the Trustees of the Miami University who made the lease in accordance with the Act of the General Assembly passed February 17, 1809, and it depends on the laws in force when it was made.

A judgment against appellant by the Court of Appeals, which the Supreme Court of Ohio may review as a matter of right when constitutional questions are involved, became final when the latter Court denied the existence of a debatable Federal Constitutional Question and dismissed the appeal.

B

The Statutory Provision Which Sustains the Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 1257 (2) of new Title 28 U. S. Code, June 25, 1948, 62 Stat. 929; formerly Sec. 344 (A) of Title 28.

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution or laws of the United States and the decision is in favor of its validity."

This case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, a review could be had in this Court on writ of error.

C

The Statute of the State of Ohio, (Sec. 5330) the Validity of Which Is Involved

Sec. 5330 as applied by the Appellees, assumes to assess in the name of Lessee Appellant, and the other leaseholders in like position, state taxes on land held in trust forever under Federal grant, by the "President and Trustees of the Miami University" and leased to Appellant through mesne assignments, has been sustained by a final judgment of the Supreme Court of Ohio in its Case No. 32,012, as not being violative of, or repugnant to the Constitution of the United States, by its finding "that no debatable constitutional question is involved in said cause." Said court is the highest court in the state in which a decision in the suit could be had.

Paragraph 1 of Sec. 5330 entitled, "Lands held under lease by Religious Society, etc., and School and Ministerial Lands under lease shall be valued and assessed in the names of lessees,"

and the first portion of said Section applicable,

"Whenever lands belonging to the state . . . or held by the State in trust, are held under lease for a term of years renewable forever and not subject to revaluation, such lands shall be considered, for all purposes of taxation, as the property of the lessees and shall be assessed in their names . . ."

D

Date of Final Judgment and Date of Application for Appeal

The date of the final judgment of the Ohio Supreme Court sustaining the motion of appellees to dismiss appeal filed by Appellant as of right, under authority of Art. IV, Sec. 2, Ohio Constitution, which provides that the Ohio Supreme Court has "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States and of this State," and dismissing the appeal for the reason stated, namely "that no debatable constitutional question is involved in said cause," is March 29, 1950. The final order denying Appellant's Application and Supplemental Application for Rehearing is April 12, 1950, and the time for taking an appeal began to run from said April 12, 1950. That under Sec. 2101 (c) of new Title 28 U. S. Code, the Appellant may present his appeal within ninety days therefrom. The date on which the Petition for Appeal was presented and the appeal allowed was May 4th, 1950.

E

The Nature of the Case and the Rulings Below

A suit filed by appellant in the Common Pleas Court of Butler County, Ohio, against Appellees-defendants, praying for an Injunction and for a Declaratory Judgment was, without any hearing on its merits, decided against him. Plaintiff claimed that Defendants had unlawfully assessed state real estate taxes against him, when he had a 99-year leasehold, renewable forever, upon his payment of stipulated ground rents, and when the Act of February 17, 1809, authorizing his lease carried an exemption from all state taxes. The fee of the College Township land is held in trust forever by the University Trustees appointed under

Ohio's Act to Establish Miami University, passed February 17, 1809 (Laws of Ohio Vol. 7, p. 184), by reason of the Federal gift of a College Township to the State of Ohio, through an Act of Congress of March 3, 1803. The petition sets forth Sec. 13 of said Act of February 17, 1809, which exempts said College Lands from all state taxes.

Appellant's Lease is shown as Exhibit A and is made a part of his petition (Record 13) and reads as follows:

"Treasurer's Office of the Miami University"

"No. 423"

"In pursuance of an Act of Congress, dated the 3rd day of March, 1803, and an Act of the General Assembly of the State of Ohio, passed the 17th day of February, 1809, entitled 'An Act to establish the Miami University and the Act amendatory thereto, passed in the year 1810'

It is Hereby Certified, That, Alfred Caldwell did on the 14th day of November, 1817 (One Thousand Eight Hundred and Seventeen) purchase of the President and Trustees of the Miami University, for the term of ninety-nine years, renewable forever, the Lot or tract of land known and designated on the Plat of Miami College Lands, as Farm Lot 5, Section 31, Township 5, Range 2—93.57 acres, the same being a part of the lands granted by Congress before recited.

Now, Therefore, be it known, that if the said Alfred Caldwell or his representative shall well and truly pay on the 14th day of November every year after the date hereof to the Treasurer of the Miami University the sum of $53.49, being the amount of interest on the purchase money, at the rate of six per cent per annum for the said lot or tract of land, then the said Alfred Caldwell or his assigns or representatives shall be entitled to hold the said lot or tract of land for the term of ninety-nine years, and shall also be entitled so often as the lease shall expire, to have the same renewed on the same conditions forever—with all and singular the

privileges and immunities granted by the several acts and laws aforesaid, and liable to all the restrictions, penalties and forfeitures imposed by the said acts and laws, in case of non-compliance with the terms and conditions herein above stated.

In Testimony Whereof, I. William Murray, Treasurer, by order of the President and Trustees of the said Miami University, and according to the law in such case made and provided, have hereunto set my hand and affixed the Corporation Seal of said University, on the fourteenth day of November, in the year of our Lord One Thousand Eight Hundred and Seventeen.

WILLIAM MURRAY,
Treasurer, M.U.P.T.

Attest James McBride, Secretary
Countersigned by the President
William Ludlow
President pro tempore."

Said Establishing Act of February 17, 1809 and said Sec. 13 thereof were construed by the Ohio Supreme Court on December 23, 1856, and same is quoted in the petition in this case, (Record p. 6) namely in the case *Kumler* v. *Traber*, Treasurer of Butler County, 5 O. S. 442. A companion case is that of *Matheny* v. *Golden*, Treasurer of Athens County, 5 O. S. 361.

A copy of the perpetual injunction issued December 1856 by the Ohio Supreme Court in *Kumler* v. *Traber* (Supreme Court Order Book 1 page 364), is shown in the petition (Record p. 6) wherein said Supreme Court:

"Ordered, adjudged and decreed that the injunction heretofore granted in this cause be and the same is hereby made perpetual. It is further ordered that the Treasurer and Auditor of said county and their successors in office, their deputies, agents and servants be, and they are hereby perpetually enjoined from ever assessing, levying and collecting any and all state taxes upon said Miami University land."

The Opinion of December 23, 1856, in *Kumler* v. *Traber*, 5 O.S. 442 is as follows:

"Kumler et al. vs. Traber, Treasurer of Butler County, 5 O.S. 443

Brinkerhoff, J. 'This case, arising out of a grant to, and a leasing of lands by the Miami University, resting, as it does, on a similar state of facts and pleadings, and involving the same questions as the preceding case of Matheny vs. Golden, there will be a like decree for complainants.' "

Matheny vs. Golden, Treasurer of Athens County, Ohio 5 O.S. 361, (December 23, 1856)

Matheny v. *Golden* from Athens County is a companion case to *Kumler* v. *Traber* from Butler County, for two similar College Townships had been given to Athens County by Congress, under the same terms and conditions as Miami University. Under the law of Ohio the syllabus of a case is controlling.

"Matheny et al. vs. Golden, Treasurer of Athens County, 5 O.S. 361. Dec. Term 1856—Syllabus:

"Where the state, by an act incorporating the Ohio University, vested in that institution two townships of land for the support of the university and instruction of youth, and in the same act authorized the university to lease said lands for ninety-nine years, renewable forever, and provided that lands thus to be leased, should forever thereafter be exempt from all state taxes: Held, that the acceptance of such leases at a fixed rent or rate of purchase by the lessees, constitutes a binding contract between the state and the lessees.

"A subsequent act of the legislature, levying a state tax on such lands, is a 'law impairing the obligation of contracts,' within the purview of the 10th section of the first article of the Constitution of the United States, and is therefore, pro tanto, null and void.

"Where one of the lessees of such lands sues as well for himself as for many other lessees of the same lands,

equity will interpose to prevent multiplicity of suits, and afford a remedy by injunction."

A history of present Section 5330 herein involved will hereinafter be shown, but the present Section 5330 is exactly similar in effect with the Section which was in effect in 1856, which the Ohio Supreme Court declared invalid because it violated the contract clause of the Federal Constitution.

Although the contract clause was relied upon and was fully set forth in the pleadings of Appellant, and was fully considered by all the courts, the Ohio Supreme Court, by a divided court, dismissed the appeal without opinion, "for the reason no debatable constitutionable question is involved in said cause." Hence this appeal.

The last paragraph of the opinion in *Matheny* v. *Golden*, Treasurer, on page 375 reads:

> "In passing upon the grave questions involved in this case, and in the exercise of the high functions to which official duty compels us, we have not been insensible of the delicacy and responsibility of our position. But we have sworn to support the Constitution of the United States; and, so far as depends on us, its guaranties must be upheld and the faith of contracts preserved inviolate."

From the foregoing it is apparent that the judges of the old school took their Constitution seriously, and that they decided the Miami University land case and the statute which attempted to tax the lands as violative of the contract clause of the U. S. Constitution.

The perpetual injunctions in said cases of *Kumler* v. *Traber*, Treasurer of Athens County, have never been modified or set aside by the Ohio Supreme Court, and the same are still in full force and effect, and should have operated in favor of the Appellant in this case.

F

The Questions Here Involved Were Somewhat Considered But Not Decided by this Court in 1942

Hughes v. *Wendel*, Treasurer of Butler County, Case No. 176. Reported in 317 U. S. 134

"No. 176"

"On Statement as to Jurisdiction. Decided Nov. 16, 1942"

"Courts. 398 (1). An appeal on theory that an Ohio statute under which a 99-year perpetually renewable lease was subjected to assessment of county taxes impaired obligation of contract, where record did not set forth the lease and the incomplete summary thereof contained in the pleading was not adequate to enable Supreme Court to determine what appellant's rights might be. Gen. Code Ohio, Sec. 5330; Laws 1809, p. 188; U.S.C.A. Art. 1, Sec. 10."

"Per Curiam. Appellant is the owner of a 99-year perpetually renewable lease of which the University of Miami, in Ohio, is lessor, and which has been subjected to assessment of county taxes pursuant to Sec. 5330 of the Ohio General Code. Appellant contends that this statute as applied violates an exemption from taxation granted by Sec. 13 of an Ohio statute of February 17, 1809, (7 Ohio Laws, p. 188), which allegedly became a part of her contract through execution of the lease, and impairs the obligation of her contract contrary to Article I, Sec. 10 of the Constitution. The record, however, does not set forth appellant's lease, and the incomplete summary of it contained in her pleading is not adequate to enable us to determine what her rights may be. Accordingly, we must dismiss the appeal. Dismissed."

The infirmity of the failure to show the lease in the record, pointed out by this Court in the above cited *Hughes*

case, is not present in this instant *Hendricks* case. It will be noted that the exact language of the lease here involved, has been set out in the Hendricks petition filed in the court of first instance. The same is shown on page 13 as Exhibit A of the printed Record here.

Said Lease by its very terms states that it is made

> "In pursuance of an Act of Congress, dated the 3rd day of March, 1803, and an Act of the General Assembly of the State of Ohio, passed the 17th day of February, 1809, entitled 'An Act to establish the Miami University and the Act amendatory thereto, passed in the year 1810'."

By such language is meant that Sec. 13 of the Act of February 17, 1809, exempting the College Township gift of the Congress from the payment of all state taxes, is a part of Appellant's leasehold contract. The lease then continues at the end thereof,

> ". . . In Testimony Whereof, I, William Murray, Treasurer, by order of the President and Trustees of said Miami University, *and according to the law in such case made and provided*". . . . which further confirms the fact that Sec. 13 of the Act of February 17, 1809, is a part of appellant's contract with the lessor.

G

Legislative History of the Lands Involved in This Case

The lands which are affected in this case are what are commonly known as "College Lands." Their legislative history is as follows:

On July 23, 1787, Congress of the United States adopted an Act empowering the Board of Treasury to contract for the sale of the western territory. (1 V.L.U.S. 573). This Act related to the tract of land of the Ohio Company's pur-

chase but formed the basis of the John Cleves Symmes' purchase.

On August 29, 1787, John Cleves Symmes filed with the President of Congress his petition referring to the Ohio Company's purchase and asking that a contract be made with him similar to that made with that Company "differing only in quantity and place where, and instead of two (2) townships for the use of an university, that only one (1) be assigned for the benefit of an academy." (1 V.L.U.S. 494).

On October 15, 1788, a contract was entered into between the Board of Treasury of the United States and John Cleves Symmes whereby the Board of Treasury agreed to sell him one million acres North of the Ohio River and between the Miami Rivers, the land to be paid for in installments and at the rate of two-thirds of One Dollar per acre (Journals of Congress, Vol. 4 page 18).

On May 5, 1792, Congress passed an Act authorizing the grant and conveyance of certain lands to John Cleves Symmes and his associates (U. S. Stats. at Large, Chap. 30, page 266).

Section 3 of the Act provides that the President of the United States is authorized to grant and convey.

On September 13, 1794, George Washington, as President of the United States, issued a patent to John Cleves Symmes in behalf of himself and his associates, conveying to him 311,682 acres of land laying between the Miami Rivers and North of the Ohio River (1 V.L.U.S. 497).

The patent contains the following provision:

> "It is hereby declared, that one complete township or tract or land, of six miles square, to be located with the approbation of the governor, for the time being, of the territory northwest of the river Ohio, and in the manner, and within the term of five years aforesaid, as nearly as may be, in the center of the tract of land hereinbefore granted, hath been and is granted, and shall be

holden in trust, to and for the sole and exclusive intent and purpose of erecting and establishing therein an academy and other public schools and seminaries of learning, and endowing and supporting the same, and to and for no other use, intent or purpose whatever."

On March 3, 1803, Congress passed an Act in addition to and in modification of the provisions contained in the Act entitled "An Act to enable the people of the eastern division of the territory northwest of the river Ohio, to form a constitution and state government, and for the admission of such State into the Union, on an equal footing with the original states, and for other purposes" (1 Chase Stat. of Ohio page 72).

Section 4 of this Act provides that a Township is

"vested in the legislature of the State of Ohio, for the purpose of establishing an academy, in lieu of the township already granted for the same purpose, by virtue of the act, entitled "An Act authorizing the grant and conveyance of certain lands to John Cleves Symmes and his associates".

On April 15, 1803, the General Assembly of the State of Ohio passed an act to provide for the locating of a college township in the district of Cincinnati (1 Ohio Laws 66). Section 1 provides the Township

"for the use and support of an academy, *in lieu of the college township heretofore granted in trust to John C. Symmes and his associates,* by the United States."

Section 2 provides for the appointment of Commissioners to locate the township and for their duties and report. The report of the Commissioners shows the location of the township in what is now Oxford Township and two sections in Milford Township and one-half section in Hanover

Township. These lands now constitute what are now known as College Lands, and are the lands in question in this proceeding.

On February 17, 1809, the General Assembly of Ohio passed "An Act to establish the Miami University" (7 Ohio Laws 184.)

As the result of the authority granted by said Act to the President and Trustees of the Miami University, leases for 99 years renewable forever were executed and the College lands were occupied by the lessees. They began then and have continued until this day to pay to the University the rents reserved in said leases.

In 1851 an entirely new Constitution was adopted for the State of Ohio, and a restriction was placed upon the new General Assembly requiring it to pass laws of a general nature having uniform operation throughout the State. Without realizing that the College Townships in Butler and Athens Counties were in a class by themselves and were exempt from all state taxes, on April 13, 1852, (50 Vol. Statutes 135), a general law regarding taxes was passed without an exemption which should have been made as to the College Lands. In the chapter entitled "Taxes"

> "Rules for Valuing Property. (7) Sec. IX. Each separate parcel of real property shall be valued at its true value in money, excluding the value of the crops growing thereon, but the price for which such real property would sell at auction, or at a forced sale, shall not be taken as the criterion of such true value. Each tract or lot of real property belonging to this state, or to any county, city, or charitable institution, whether incorporated or unincorporated, and school or ministerial lands, held under lease for a term exceeding fourteen years, shall be valued at such price as the assessor believes could be obtained at private sale for such leasehold estate."

It is the above Tax Section IX which was declared unconstitutional by the Ohio Supreme Court on December 23, 1856.

Because the Leaseholders had not been paying taxes, suits to enjoin same were filed in 1852 in Butler and Athens Counties, and the cases of *Kumler* v. *Traber*, Treasurer of Butler County, (5 O.S. 442), and *Matheny* v. *Golden*, Treasurer of Athens County (5 O.S. 361) were decided in favor of the leaseholders, by the Supreme Court of Ohio.

Although the appellees here are, under said decision of the Supreme Court of Ohio enjoined perpetually from assessing and collecting any and all state taxes on the College Lands, they claim the right under present Sec. 5330 O. Gen. Code, which appellant claims is unconstitutional, as was the former Tax Section IX enacted April 13, 1852.

Present Sec. 5330, was enacted May 6, 1919 (108 Ohio Laws, Part 1, page 612) and the first part only of said Section is herein involved, to-wit:

> "Whenever lands belonging to the state, a municipal corporation, religious, scientific or benevolent society or institution, whether incorporated or unincorporated, or to trustees for free education only, or held by the state in trust, are held under lease for a term of years renewable forever and not subject to revaluation, such lands shall be considered, for all purposes of taxation, as the property of the lessees and shall be assessed in their names." . . .

Miami University lands are not subject to revaluation. (8 Laws of Ohio, p. 94, Feb. 6, 1810.)

H

Substantiality of Question Involved

The Federal constitutional question involving the validity of the Ohio Statute Section 5330, is a substantial one which

goes to the merits of the entire controversy. It is clearly not injected into the case as an incidental question with the thought of giving some color to the Federal issue for the purpose of creating a basis to appeal to the United States Supreme Court. It must appear that the Federal Question was presented to the highest court of the state, and was distinctly ruled upon and denied, at least in substance. The fact that the State Supreme Court has declared that no Federal Question exists does not affect the right to a review. *Mo. K. and T. R. Co.* v. *Elliott,* 184 U. S. 530. *San Jose Land* v. *San Jose Ranch Co.,* 189 U. S. 177. Where the contract clause of the Federal Constitution is involved, the United States Supreme Court must determine for itself what the contract is and whether it has been impaired. *Funkhouser* v. *Preston,* 290 U. S. 163; *Dodge* v. *Board of Education,* 302 U. S. 74.

The necessary effect of the judgment of the Ohio Supreme Court dismissing the appeal filed as of right in the instant case on constitutional questions has been to deny the claim.

THE PRESENT SUPREME COURT OF OHIO HAS NEVER CONSTRUED THE FIRST PARAGRAPH OF SEC. 5330 INVOLVED IN THIS APPEAL, AS SAME APPLIES TO MIAMI UNIVERSITY LANDS, BUT HAS ALWAYS REFUSED TO DETERMINE SUCH QUESTION AND TO ADMIT ANY CASE TO THAT COURT IN WHICH ITS CONSTRUCTION WOULD HAVE BEEN NECESSARY. THE INSTANT CASE HAS BEEN TREATED WITH THE SAME IMPROPRIETY.

The decision of the Ohio Supreme Court in the case of *State ex rel.* v. *Tracy,* 125 Ohio State 399, holding that Sec. 5330 is not unconstitutional and not violative of the compact between the United States and the State of Ohio applies ONLY TO SECTION 16 OF EACH TOWNSHIP which was granted by the United States to the State of Ohio in trust for the use of the *Common schools* of Ohio.

Said case does not in any way apply to the John Cleves Symmes Substituted College Township which is in a class by itself. It is an entirely separate matter from the *common school* Section 16 in each Township in Ohio. The Court said on page 406, "Of course Section 16 is in a class by itself."

I

Where the Constitutional Question Was Raised

The appellant drew in question the validity of the statute, to-wit, the first paragraph of Section 5330 of the Ohio General Code, as being violative of Section 10, Article 1 of the Constitution in the court of first instance, namely, the Common Pleas Court, in his petition and amended petitions.

The unconstitutionality of said Section 5330 was set forth in the proceedings and in the Assignments of Error in the Court of Appeals, and in the Ohio Supreme Court.

J

No Opinions of the State Courts

No opinion was rendered by the Ohio Supreme Court or the two lower Courts.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 1257 (2) of new Title 28 of the United States Code, and that the question presented is one of a substantial nature.

Respectfully submitted,

GEORGE S. HAWKE,
Counsel for Appellant, Cincinnati.

(8839)

FILED
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CHARLES ELMORE CROPLE
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,
Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, ET AL.,
Appellees

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Now comes Raymond H. Smith, one of the Appellees herein, and moves the Court in the above entitled action to dismiss this appeal.

In the alternative, this Appellee moves the Court for an affirmance of the decree of the Supreme Court of Ohio dismissing Appellant's appeal as of right on constitutional grounds and denying Appellant's motion to certify the record of the lower Court.

This Appellee bases his motion upon the following grounds:

1. The record in this case is not sufficiently complete to enable the Court to determine the nature of the question

involved, whether or not a federal question is involved, and whether or not a substantial federal question is involved.

This case is appealed from an order of the Common Pleas Court of Butler County, Ohio, sustaining a motion filed by defendants (Appellees) (November 20, 1946) to strike from the petition certain language. In other words, the plaintiff (Appellant) did not state a sufficient cause of action under the pleadings. Subsequently (April 13, 1948) the plaintiff (Appellant) not pleading further, the Court dismissed the plaintiff's petition.

The authority for the lower Court's finding was decided cases in the State of Ohio at the time of the ruling.

Baker v. *DuBois, Treasurer,* 130 Ohio State 339, 199 N. E. 181;

Mary M. Hughes v. *John W. Wendel, Treasurer,* 143 Ohio State 559, 56 N. E. (2nd) 63.

and additional cases cited therein.

2. The federal question, if any involved, is not substantial.

3. The federal question, if any involved, was not properly raised in the State Court by the appeal.

This is an appeal from an order of the Common Pleas Court of Butler County, Ohio, sustaining a motion to strike from the petition certain language described in said petition.

The Appellant (plaintiff) in his original petition includes argumentative matters and plead therein certain papers, exhibits, etc. that were evidentiary and which should have been offered at the trial in this case as evidence. The Appellant (plaintiff) should have filed an amended petition and corrected his pleadings so that the case could have been heard on the merits. By refusing to plead further and having the Court dismiss the case, all questions are

eliminated, especially constitutional questions, except the question of the sufficiency of the pleadings filed by the Appellant (plaintiff).

The lower Court, in taking such action, did not render an opinion and the Entry did not state that the ruling was made on constitutional grounds. No evidence was introduced at said hearing and no Entry or finding of the Court was ever made that this ruling was based on constitutional grounds.

Respectfully submitted,

JACKSON BOSCH,
Prosecuting Attorney,
Attorney for Raymond H. Smith, et al.,
Appellees.

(8741)

Office-Supreme Court, U. S.
FILED
JUN 5 1950
CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,

Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, ET AL.,

Appellees

APPELLANT'S ANSWER TO MOTION TO DISMISS OR AFFIRM

The Supreme Court of Ohio entertained jurisdiction because the case had reached it through final orders of the two lower courts.

The matters relied upon by appellees in their Motion to Dismiss or Affirm are now raised for the first time. No mention of a defense that the final order of the Common Pleas Court was not appealable was ever raised in any of the courts through which this case proceeded. It is, therefore, too late in this manner to raise such a question.

In the Common Pleas Court, when defendants were in default for answer or demurrer, and persistently failed to plead, even when so ordered by the Court to do so (Record

p. 16) they, without leave of court, filed more than two years later a motion to strike from plaintiff's amended petition, which was filed to meet defendants' former objections. Thereupon, plaintiff filed a motion to strike defendants' said motion from the files because it was filed contrary to law.

When it appeared impossible to get the lower court to rule upon said motions, the Court of Appeals issued its peremptory writ of mandamus, requiring the trial judge to proceed forthwith to rule. The final entries of the Common Pleas Court became the final orders from which this appeal was taken to the Court of Appeals. No question was ever raised that the judgment of the trial court was not a final order, from which an appeal could be taken, the court dismissing plaintiff's petition at his costs.

The Federal Constitutional Question was definitely raised in Plaintiff's petition, and said question predominated and was fully considered by the Court of Appeals and the Supreme Court of Ohio, and same was the vital issue throughout these proceedings, which have been pending seven years. Appellant prays that said motion be overruled.

G. S. HAWKE,
Attorney for Appellant.

(8740)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,
Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, ET AL.,
Appellees

SUPPLEMENTAL ANSWER TO MOTION TO DISMISS, OR AFFIRM

By this Supplemental Answer, Appellant replies to each statement of Appellees' Motion to Dismiss, seriatim, because said Motion presents misleading and unfair statements as to the facts, and as to the continuity of the proceedings in the Common Pleas Court. Such continuity is shown in the Transcript in the printed Record, pp. 16, 17.

While this Hendricks action for a *Declaratory Judgment* was filed March 6, 1943, the Appellees, by means of two defaults and through unconscionable delays, refused

to comply with the Court's order of August 14, 1944, *requiring them to "plead"* by September 11, 1944.

After a delay of more than *two and a half years,* the Appellees, WHEN IN DEFAULT OF ANY "PLEADING," which had been ordered by the Court, and when they were not authorized by law to file any motion, *did on November 30, 1946* file a Motion to Strike out part of Plaintiff's Second Amended Petition.

Such motion of defendants-Appellees not being a "PLEADING" under the laws of Ohio, (O. Gen. Code Sec. 11,303) which was required by said Court's order, *was filed without leave of court and without authority of law,* and Appellant-plaintiff at once on November 30, 1946 filed his Motion to Strike said Appellees' Motion from the Files. (Rec. 14, 15.)

When it was impossible to induce the Common Pleas Judge to rule on said two motions, *a Writ of Mandamus was secured* from the Court of Appeals under favor of O. Gen. Code Sec. 1685, requiring the judge to proceed to pass upon said motions, which he then did immediately on *April 13, 1948,* after a delay of more than a year and a half, by overruling Appellant's Motion to Strike from the Files, (Rec. 16, 17) and by sustaining Appellees' Motion to Strike out parts of Plaintiff's Second Amended Petition, *and in said Order dismissing his cause of action at his costs.*

Said order of April 13, 1948 dismissing Plaintiff's Second Amended Petition was the Final Order from which he appealed. Said order was thereafter, WITHOUT CHALLENGE, considered as a final appealable order under the laws of Ohio, by the Court of Appeals and by the Supreme Court of Ohio. (Rec. 17.)

A Motion is not a "Pleading" under the laws of Ohio,

and Plaintiff's Motion of November 30, 1946 to Strike from the Files the Motion of defendants' of November 20, 1946 should have been sustained. *McCabe,* vs. *Tom,* 35 Ohio Appellate 73. "Defendant may not plead as of right after rule day, or after expiration of any extention of time granted by court."

The following language in Appellees' Motion to Dismiss, or Affirm, is misleading and is an unfair statement of the facts, to-wit:

> "This is an appeal from an order of the Common Pleas Court of Butler County, Ohio, sustaining a motion to strike from the petition certain language described in said petition."

This Appellant's answer to the foregoing statement of Appellees, *is that this is an appeal from a final order* of April 13, 1948 of the Common Pleas Court DISMISSING PLAINTIFF'S CAUSE OF ACTION, and is not an appeal from an interlocutory order merely sustaining a motion of Defendants-Appellees to strike out part of plaintiff's Second Amended Petition.

Appellees' Motion to Dismiss contains the following statement:

> "The authority for the lower Court's finding was decided cases in the State of Ohio at the time of the ruling.
>
> "Baker *vs.* DuBois, Treasurer, 130 U.S. 339;
>
> "Mary M. Hughes *vs.* John W. Wendel, Treasurer, 143 O.S. 559, and additional cases cited therein."

It is not true that the lower Court considered and followed such citations of authority, for he neither asked for nor received any authorities to support his ruling on said

Final Order of April 13, 1948, and if he had, he would have been informed that the cited case of

> DuBois, Treasurer of Butler County, Plaintiff, *vs.* Lillie Baker, Defendant, (130 O.S. 339.)
> Has Never Been Decided, and That Same is Still Pending as Case No. 44,665 *in the Common Pleas Court.*

The facts are, that Du Bois, Treasurer, on August 3, 1934 filed said case against Lillie Baker, a leaseholder of Miami University land, for a money judgment for non-payment of state taxes, and For Foreclosure of a Real Estate Tax Lien of the State of Ohio, claimed due under Sec. 5330 Ohio Gen. Code. *States taxes* had been assessed against said defendant on land she held under lease for 99 years, renewable forever, and she had paid to the University the rent required under her lease. She claimed an exemption of all state taxes under authority of the Act of February 17, 1809, (7 Ohio Laws 188).

When said Treasurer's case reached the stage of a demurrer of defendant Baker to the Amended Reply of the plaintiff-Treasurer, the Common Pleas Court sustained Mrs. Baker's Demurrer, and dismissed the Treasurer's Petition, at his costs.

Thereupon, said Treasurer Du Bois prosecuted an appeal to the Court of Appeals of Butler County, being its Case No. 663. Said Court of Appeals reversed the Common Pleas Court on the subject of the Demurrer, and by mandate sent the case back to the Common Pleas Court for further proceedings.

Lillie Baker thereupon took an appeal from the Court of Appeals to the Supreme Court of Ohio, being its Case No. 25,559, decided December 26, 1935, in an unsuccessful effort to reverse said Court of Appeals on the question of

the demurrer. The mandate of the Supreme Court, dated January 2, 1936, sending the case back to the Common Pleas Court of Butler County for further proceedings therein, was filed in said Court on May 8, 1936, AND THE CASE IS STILL PENDING THERE, AND IS STILL UNDECIDED BY THE COMMON PLEAS COURT, AND HAS NEVER BEEN TRIED ON ITS MERITS. Appellant claims that said pending case cannot be any authority in this case.

Regarding the other cited authority of *Mary M. Hughes*, Defendant-Appellant, vs. *John W. Wendel, Treasurer of Butler County*, Plaintiff-Appellee, the same is not reported in 143 O.S. 559, as stated, but in 139 O.S. 632, where the Supreme Court of Ohio on April 15, 1942 simply dismissed Mrs. Hughes' appeal "for the reason that no debatable constitutional question is involved."

On page 16 of Appellant's printed Statement as to Jurisdiction herein, attention is called to the fact, that an unsuccessful effort was made to have this Court review said case of *Hughes* vs. *Wendel*, but this Court dismissed the appeal for the sole reason that it was impossible from the record before it, to ascertain just what the leases on Miami University lands provided, so that this Court could determine whether the Federal Constitution was violated by Sec. 5330 O. Gen. Code. Said case of *Hughes* vs. *Wendel*, therefor, constitutes no authority here.

Appellees' Motion to Dismiss closes with the sentence, "No evidence was introduced at said hearing and no entry of finding of the Court was ever made that this ruling was based on constitutional grounds."

It should be apparent from the pleadings, that it was impossible for plaintiff to introduce any evidence, when the final entry dismissed the case at his costs. The Second Amended Petition claimed that Sec. 5330 was a state law which impaired the obligation of plaintiff's lease, contrary

to the Federal Constitution, and the consideration of each of the three Ohio Courts was always directed to that guaranty. The finding of the Supreme Court of Ohio "that no debatable constitutional question is involved in this cause," does not affect Appellant's right to a review. Appellant therefore prays, that Appellees' Motion to Dismiss or affirm be overruled.

Respectfully,

G. S. Hawke,
for Appellant.

(9566)

FILED
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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 114

JAMES E. HENDRICKS, ON BEHALF OF HIMSELF AND ALL OTHER LEASEHOLDERS OF LANDS OF MIAMI UNIVERSITY,
Appellant,

vs.

RAYMOND H. SMITH, AS AUDITOR OF BUTLER COUNTY, OHIO, ET AL.,
Appellees.

Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING

Appellant hereby respectfully petitions for a Rehearing. This Court's per curiam closes with:

> "IT IS FURTHER ORDERED that the appeal herein be, and it is hereby, dismissed for the want of a *substantial federal question.* Mr. Justice Douglas is of the opinion probable jurisdiction should be noted." (We note an unusual feature in that no authorities were cited.)

Appellant throughout contended that the *substantial federal question* here presented to this Court, was the prohibition in Section 10 of Article One of the U.S. Constitution, namely, "That no State shall pass any Law

impairing the Obligation of Contracts." That appellant had been denied his rights which are protected by said clause, through the enactment of Sec. 5330 Ohio General Code, as set forth in his petition in the court of first instance.

Attention is hereby called to the following matters which should indicate to this Court, *that there is a substantial federal question involved* in this appeal.

Appellant is one of some *six hundred* 99 year Leaseholders of Miami University Lands, who are, under their leases, required to pay GROUND RENT, and are, by the same leases *"Exempt from all State Taxes."* Such leases were executed under authority of an Act of February 17, 1809, (7 Ohio Laws 188). A subsequent statute, Sec. 5330, has been enacted, requiring the payment of State taxes in addition to the rents. Appellant claims, that said subsequent Section 5330, impairs his leasehold contracts, and same is therefore void and unconstitutional under Art. One, Sec. 10.

In the instant case, this Court may have overlooked the fact, that numerous cases involving land-grant colleges have been decided by it since the founding of the Republic, as will hereinafter appear. We have been unable to find any single instance where this Court has denied its Jurisdiction, and therefore boldly declare that the Contract Clause of the Constitution is virile, and is still in full force and effect to obtain the enforcement of provisions made for the benefit of the colleges.

No denial of such exemption *"from all state taxes"* was ever asserted thereafter, until an Act was passed on April 13, 1852, (50 Ohio Statutes 135), which Act endeavored, *without success*, to tax both the college-grant lands of Miami University in Butler County, Ohio, and of Ohio University in Athens County, Ohio.

Perpetual injunctions issued by the Ohio Supreme Court on December 23, 1856, prohibiting all state taxes in the

companion cases of *Matheny* vs. *Golden* (Athens County), 5 O. S. 361, and *Kumler* vs. *Traber* (Butler County), 5 O. S. 443, *are still in full force and effect.* Same was so declared by the Ohio Supreme Court as recently as *July* 28, 1948, in *Orphans' Asylum* vs. *Board of Tax Appeals*, 150 O. S. 219, in which said Supreme Court cited with approval, and followed the case of *Matheny* vs. *Golden.*

This Court's jurisdiction has heretofore always been determined in favor of its jurisdiction in cases similar to the instant case.

This Court DID NOT DENY jurisdiction in its recent case of *Hughes* vs. *Wendel*, 317 U. S. 134 (1942), but found, that because the record before it did not set forth the terms of the Hughes Lease, the incomplete summary of it was inadequate to enable this Court to determine what her rights might be; hence, dismissed said appeal. Said Hughes case involved exactly the same tax exemptions as the instant case, namely the Miami University Leaseholders' exemption from all state taxes.

This Court granted jurisdiction in *Armstrong* vs. *Treasurer of Athens County, Ohio*, 16 Peters 281 (1842), reported below in 10 Ohio Reports (1840). Said case involved the taxation of two Ohio University Federal land-grant college townships in Athens County.

The above *Armstrong* case was followed and approved in *Murray* vs. *Charleston*, (1877) 96 U. S. 432, this Court saying:

p. 442 "The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that Court could not have been given without deciding upon a right or

authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell* vs. *Randall*, (10 Pet. 368), it was laid down, after a review of almost all our previous decisions, "that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment. THIS CASE WAS FOLLOWED BY *Armstrong et al.* vs. *The Treasurer of Athens County* (16 Peters 281), where it was held sufficient to give this Court jurisdiction if it appear from the record of the State Court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it." See also *Bridge Proprietors* vs. *The Hoboken Company*, 1 Wall. 116, and *Furman* vs. *Nichol*, 8 id. 44.

p. 444 "But the power (to tax) is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no State shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a State legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted State taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power."

p. 448 "The obligation of a contract depends upon its terms and the means which the law *in existence at*

the time affords for its enforcement. A law which alters the terms of a contract, by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation."

p. 448 "*There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts*, and it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

This Court entertained jurisdiction in the college Federal land-grant case of *Trustees for Vincennes University* vs. *Indiana*, (January Term 1842) 14 Howard 268, see pages 273, 276, 277.

THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION IS A LIMITATION ON THE POWER OF THE STATES, WHATEVER FORM IT MAY ASSUME, IF A CONTRACT RIGHT IS THEREBY IMPAIRED. *Murray* vs. *Charleston*, 96 U. S. 432, 444 (1878); *Sturges* vs. *Crowninshield*, 4 Wheat. 122.

A State legislature is prohibited from enacting laws impairing an existing Contract. *New Orleans Waterworks Co.* vs. *Louisiana*, 185 U. S. 336 (1902).

Since laws in force at the time a contract is entered into form a part of the contract, any subsequent change of law which amounts to an impairment of the contract violates this provision of the Constitution. *Fletcher* vs. *Peck*, 6 Cr. 87 (1810); *Oden* vs. *Saunders*, 12 Wheat. 213 (1827); *Bronson* vs. *Kinzie*, 1 How. 311; *McCracken* vs. *Hayward*, 2 How. 608, 612 (1844); *West River Bridge Co.* vs. *Dix*, 6 How. 507,

532 (1848); *United States ex rel. Von Hoffman* vs. *Quincy*, 4 Wall. 535, 550 (1867); *Walker* vs. *Whitehead*, 16 Wall. 314, (1878); *Edwards* vs. *Kearzey*, 96 U.S. 595 (1878); *Abilene National Bank* vs. *Dolley*, 228 U. S. 1 (1913); *Chicago, B. & Q. R. Co.* vs. *Cram*, 228 U. S. 70 (1913).

Before the contract clause can be invoked, it must appear that there was a valid subsisting contract between the parties. *Concord* vs. *Portsmouth Sav. Bank*, 92 U. S. 625 (1867); *Ochiltree* vs. *Iowa Contracting Co.*, 21 Wall. 249, (1875).

When absolute rights of property have been acquired and vested by authority of law, no subsequent legislation can divest such rights. *Fletcher* vs. *Peck*, 6 Cr. 87 (1810); *Carondelet Canal & Nav. Co.* vs. *Louisiana*, 233 U. S. 362 (1914).

A state can no more impair by legislation the obligation of its own contracts than it can those between private individuals. *Woodruff* vs. *Trapnall*, 10 How. 190, 207 (1851); *Providence Bank* vs. *Billings*, 4 Pet. 514, 560 (1830); *Green* vs. *Biddle*, 8 Wheat. 92 (1823); *Fletcher* vs. *Peck*, 6 Cr. 87, 127, (1810).

Since it is within the power of the legislature to bind the State by a contract, the rights conferred thereby cannot be impaired by subsequent legislation. *Richmond F. & P. R. Co.* vs. *Louisa R. Co.*, 13 How. 71 (1851); *Dodge* vs. *Board of Education of Chicago*, 302 U. S. 74 (1937).

Where a State has accepted a conditional grant of lands by the U. S., there is a binding contract which cannot be impaired by subsequent State legislation without infringement of the Constitution. *McGehee* vs. *Mathis*, 4 Wall. 143 (1866).

When AN ACT OF CONGRESS VESTED IN THE INDIANA LEGISLATURE AN ADDITIONAL TOWNSHIP FOR THE SOLE USE OF A SEMINARY OF LEARNING, the State could not defeat

the trust without impairing contract obligations. *Vincennes University* vs. *Indiana*, 14 How. 268, 275 (1853).

The charter of a private corporation which has been accepted and acted upon is a contract between the State and the corporators, and within the provision of the constitution prohibiting legislation impairing the obligation of contracts. *Dartmouth College* vs. *Woodward*, 4 Wheat. 627 (1819); *Jefferson College* vs. *Washington & J. College* (Pa. College Cases), 13 Wall. 190, 213 (1872); *Dartmouth College* vs. *Woodward*, 4 Wheat. 518 (1819).

A state may subject a corporation to taxation from which it was previously exempt, unless an irrevocable exemption was clearly expressed. *Covington* vs. *Kentucky*, 173 U. S. 231 (1899).

However, the sale of tax exempt land by a University has been held to subject the lands thereafter to taxation. *Armstrong* vs. *Athens County*, 16 Pet. 281 (1842).

To constitute an impairment some subsequent legislation must be given effect as against the contract. *Cleveland* vs. *Cleveland City R. Co.*, 194 U. S. 517 (1904); and the contract must contain a valid subsisting obligation, not a contingent or speculative one. *Ochiltree* vs. *Iowa R. Contracting Co.* 21 Wall. 249, 252 (1875).

It is a law which impairs the obligation of the contract — and not the contract itself — which is interdicted. *Ogden* vs. *Saunders*, 12 Wheat. 213, 257 (1827); *Walker* vs. *Whitehead*, 16 Wall. 314 (1873).

A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation. *Cleveland, P. & A. R. Co.* vs. *Pa.*, 15 Wall. 300, 320 (1873).

Any law which, in its operation, amounts to a denial or obstruction of the rights accruing under a contract impairs its obligation, as does a law which diminishes the duty

to fulfill or impairs the right to enforce the contract. *McCracken* vs. *Hayward*, 2 How. 608 (1844); *Pritchard* vs. *Norton*, 106 U. S. 124 (1833). In other words, any law which invalidates, extinguishes, releases or derogates from substantial contractual rights impairs its obligation. *Home Bldg. & Loan Assn.* vs. *Blaisdell*, 290 U. S. 398 (1934); *Hendrickson* vs. *Apperson*, 245 U. S. 105 (1917).

The constitutional prohibition against impairment of contract obligations has no reference to the degree of impairment. *U. S. ex rel. Von Hoffman* vs. *Quincy*, 4 Wall. 535 (1867); the extent of the impairment which the law affects is not material. *Green* vs. *Biddle*, 8 Wheat. 1 (1823); *Walker* vs. *Whitehead*, 16 Wall. 314 (1873); *Farrington* vs. *Tennessee*, 95 U. S. 683 (1878). It is not a question of degree; the obligation must not be diminished at all. *Planters Bank* vs. *Sharp*, 6 How. 301 (1848).

N. O. Waterworks Co. vs. *La. Sugar Ref. Co.* (1887) 125 U. S. 18.

The provision of the Constitution of the U. S., which declares that no State shall pass any law impairing the obligation of contracts, is aimed at the legislative power of the State, and not at decisions of its courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals.

Oskosh Waterworks Co. vs. *Oskosh*, 187 U. S. 437.

> "The contract clause of the Constitution of the United States has reference only to a statute of a State enacted AFTER the making of the contract whose obligation is alleged to have been impaired." (Emphasis ours.)

Lehigh Water Co. vs. *Easton*, (1866) 121 U. S. 388.

> "The provision in the Constitution of the U. S. that 'no State shall pass any law impairing the obligation of contracts' necessarily refers to the law made after the particular contract in suit."

"The judgment of the highest court of a state involving the enforcement or interpretation of a contract is not reviewable in this court, under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless by its terms or necessary operation it gives effect to some provision of the state constitution, or some legislative enactment of the state claimed by the unsuccessful party to impair the contract in question."

Northwestern University vs. *People*, 99 U. S. 309 (1878).

A statute of Illinois, passed in 1855, declares that all the property of the Northwestern University SHALL BE FOREVER FREE FROM TAXATION. As construed by the assessors and by the Supreme Court of the State, a statute of 1872, conforming taxation to the new constitution of 1870, limited this exemption to land and other property in immediate use by the institution. Held, 1. That the latter statute impaired the obligation of the contract of exemption found in the statute of 1855. 2. That whether the statute of 1855 is a valid contract, or is void by reason of its conflicting with the State Constitution of 1848, under which it was made, IS A QUESTION ON WHICH THE JUDGMENT OF THAT COURT CAN BE REVIEWED HERE. (Emphasis ours.)

Detroit United Ry. vs. *Michigan*, 242 U. S. 238, 249 (1916).

"Notwithstanding statements in *Henderson Bridge Co.* vs. *Henderson*, it is settled that when called upon to exercise jurisdiction under the contract clause this court must determine upon its independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? and (3) Has that obligation been impaired by subsequent legislation?

Houston & Texas Central Rd. Co. vs. *Texas*, 177 U. S. 66, 77 (1899).

> "Upon these facts this court has jurisdiction, and it is its duty to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this court, it has been impaired by any subsequent state legislation to which effect has been given by the court below." *Bridge Proprietors* vs. *Hoboken Co.*, 1 Wall. 116; *Northwestern University* vs. *People*, 99 U. S. 309; *Fisk* vs. *Jefferson Police Jury*, 116 U. S. 131; *N. O. Waterworks* vs. *La. Sugar Ref. Co.*, 125 U. S. 18; *Central Land Co.* vs. *Laidley*, 159 U. S. 103, 109; *Bacon* vs. *Texas*, 163 U. S. 207, 216; *McCullough* vs. *Va.*, 172 U. S. 102.
>
> "In this case we think we have shown that the judgment did give effect to subsequent legislation which, as construed by the state court, the company claims has impaired the obligation of the contract between itself and the State. The writ of error was therefore well brought."

Where a State exempts the "campus" and "endowment fund" of a college from taxation, other land held by the college as a part of its endowment is subject to taxation. *Jetton* vs. *University of the South*, 298 U. S. 161; *Millsaps College* vs. *Jackson*, 275 U. S. 129 (1927).

The Supreme Court looks to the laws in force at making of the contract to determine the obligation of the contract. *Worthen Co.* vs. *Kavanaugh*, 295 U. S. 56 (1935).

Where the jurisdiction of the U. S. Supreme Court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, *it is the duty of the Court* to exercise independent judgment as to the nature and scope of the contract. *Board of Liquidation* vs. *Louisiana*, 179 U. S. 622 (1901).

While the Supreme Court generally accepts the construction placed by the courts of a State upon its statutes and

constitution, THERE IS AN EXCEPTION TO THIS RULE IN THE MATTER OF CONTRACTS ALLEGED TO HAVE BEEN IMPAIRED. *McCullough* vs. *Va.*, 172 U. S. 109 (1898); *Piqua Branch of State Bank* vs. *Knoop*, 16 How. 391 (1854); *Wright* vs. *Nagle*, 101 U.S. 791 (1880).

The Supreme Court is not bound by the decision of a State Court as to the existence and terms of a contract, the obligation of which is asserted to be impaired. *Phelps* vs. *Board of Education*, 300 U. S. 319 (1937).

It is the duty of a Federal Court to determine for itself the extent, construction, and validity of the alleged contract, and also to determine whether as so construed it has been impaired by any subsequent legislation to which effect has been given by the State Court. *Houston & T. C. R. Co.* vs. *Texas*, 177 U. S. 77 (1900); *Seton Hall College* vs. *South Orange*, 242 U.S. 100 (1916); *Atlantic Coast Line R. Co.* vs. *Goldsborough*, 232 U. S. 548 (1914); *Great Northern R. Co.* vs. *Minnesota*, 216 U. S. 206 (1910). *Civil Rights Cases*, 109 U. S. 12 (1883); *Woodruff* vs. *Mississippi*, 162 U. S. 291 (1896).

In determining the meaning of the contract and whether its obligation has been impaired by State legislation, the Supreme Court must reach its conclusion independently of the judgment of the State Court construing the State legislation involved, though the State's judgment is very persuasive as to the meaning of the statute. *Larson* vs. *South Dakota*, 278 U. S. 429 (1929); *Moore-Mansfield Constr. Co.* vs. *Electrical Installation Co.*, 234 U. S. 619, 625 (1914).

The jurisdiction of the Supreme Court under the contract clause does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the State Court of last resort, and this irrespective of the process of reasoning by which the decision is reached or the precise extent to which reliance is placed upon subsequent

legislation. *Detroit United R. Co.*, vs. *Michigan*, 242 U. S. 238 (1916).

When a State Court has given effect to a subsequent law, the Supreme Court decides whether the effect so given by the State Court violated the Federal Constitution. *Northern Cent. R. Co.* vs. *Maryland*, 187 U. S. 266 (1902).

SUMMARY

In the instant case, the State Court gave effect and upheld *the subsequent law* of the State of Ohio, to wit, Sec. 5330, passed in its present form May 6, 1919, and the State Court decided the instant case upon grounds of said law of May 6, 1919, thus making this case one for review by this Court upon the ground of the *impairment of the contract*, which contract was authorized by the law of February 17, 1809. Said law was ignored through the subsequent and present Sec. 5330.

Thus jurisdiction attaches because of the impairment of the obligation of contract, and this Court should review the Federal Question, WHICH IS SUBSTANTIAL, and directly grows out of an alleged impairment of the obligation as a contract. Thus force has been given to the Statute complained of, to wit, Sec. 5330, and this Court's jurisdiction attaches.

Upon the facts before it this Court has jurisdiction, and it is thereby the duty of this Court to determine for itself the existence, construction and validity of the alleged contract, and also to determine whether, as construed by this Court, it has been impaired by any subsequent state legislation, to wit, Sec. 5330, to which effect has been given by the Court below.

Green vs. *Billings*, 8 Wheat. 1, 91 (1823). "Having thus endeavored to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the duty, not less than the power of this Court, as well as

of every Court in the Union, to declare a law unconstitutional, WHICH IMPAIRS THE OBLIGATION OF CONTRACTS, whoever may be the parties to them, is too clearly enjoyed by the constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken, and that those decisions entirely cover the present case."

For the foregoing reasons it is respectfully urged that this Petition for a Rehearing be granted, and that the Motion of Appellees to Dismiss the Appeal be overruled.

Respectfully submitted,

GEORGE S. HAWKE,
Counsel for Appellant.

I, George S. Hawke, Counsel for the above named Appellant, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith, and not for delay.

GEORGE S. HAWKE,
Counsel for Appellant.

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DECISIONS PER CURIAM AND ORDERS FROM BEGINNING OF OCTOBER TERM, 1950, THROUGH MARCH 27, 1951.

OCTOBER 9, 1950.

Per Curiam Decisions.

No. 114. HENDRICKS *v.* SMITH, AUDITOR OF BUTLER COUNTY, ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS is of the opinion probable jurisdiction should be noted. *George S. Hawke* and *Robert H. Fosdick* for appellant. *Jackson Bosch* for appellees. Reported below: 153 Ohio St. 500, 92 N. E. 2d 393.

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